1979

Veneta Jesperson v. William Leroy Jesperson, Sr. : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

VENETA JESPERSON, Plaintiff and Respondent, vs. WILLIAM LeROY JESPERSON, SR., Defendant and Appellant.	* * * * * * *	No. 16413

RESPONDENT'S BRIEF

Response to Appeal from the Judgment of the Fifth District Court for Washington County, Hon. Robert F. Owens, District Judge Pro Tem

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VENETA JESPERSON,	*	
Plaintiff and Respondent,	*	
vs.	*	No. 16413
WILLIAM LeROY JESPERSON, SR.,	*	
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Response to Appeal from the Judgment of the 5th District Court for Washington County, Hon. Robert F. Owens, District Judge Pro Tem

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STATEMENT OF POINTS

1. The division of property belonging to the parties was proper inasmuch as the trial court must consider each case on its own facts, and achieve equity, may exercise wide latitude in awarding relief as it deems just and proper.

2. The court below properly awarded the Appellant the value of his labors consistent with evidence presented at trial. The conduct and testimony of the parties demonstrates that no gift was intended and that each party considered himself owner of his separate property.

STATEMENT OF THE KIND OF CASE

This is a divorce action where the sole issue is the equitable distribution of property.

DISPOSITION IN LOWER COURT

This case was tried to the court Judge Robert F. Owens, District Judge pro tem and a Circuit Judge of the State of Utah Presiding.

RELIEF SOUGHT

That Defendant-Appellant, William LeRoy Jesperson, Sr. be denied any modification whatsoever of the division of property made by the court below consistent with the evidence presented to the lower court and the points presented in this response to the appeal.

STATEMENT OF FACTS

The Plaintiff-Respondent and the Defendant-Appellant were married to each other on March 20, 1973 in Roswell, New Mexico, and no children were born as issue to the marriage (Tr. P14, LL12-18). Plaintiff is now 74 years old and Defendant is now 79 years old. (Full Disclosure Financial Declarations).

At the time of the marriage the Defendant-Appellant had no assets having been unemployed for some five years prior thereto with monthly social security as his sole source of income (Tr. P201, LL4-25, LL1-6). Plaintiff-Respondent

did own property consisting of an automobile, furniture, $12,500.00 in certificates of deposit, $10,000.00 in savings, (Tr. P38, LL4-9), and a mobile home which had been recently purchased for $17,500. (Tr. P38, LL4-9).

On March 1, 1979 a trial was held pursuant to the Plaintiff-Respondent's action for divorce at which time the court distributed the property of the marriage 77% to the Plaintiff and 23% to the Defendant. (FINDINGS P.2, March 2, 1979). The court also made the following findings:

1. Although the mobile home in issue is held in joint tenancy, there was no intention by Plaintiff to create a one-half property interest in Defendant, nor any expectation by Defendant that he had received a one-half property interest.

2. Defendant was guilty of repeated marital misconduct which not only constitutes grounds for divorce, but which should be considered in making an equitable division of property.

3. The purchase price of the mobile home and lot in issue was $19,027.00 which was all contributed from Plaintiff's separate funds, and which she is entitled to recover from the $27,000.00 sales price, leaving a balance of $7,973.00 to be disposed of. (FINDINGS, P1, March 2, 1979)

The Plaintiff-Respondent does not agree with and

takes exception to the Defendant-Appellant's statement of facts inconsistent with the statement herein contained for the reason that the Defendant-Appellant's statement of facts is in essence argument and not a concise statement of the facts as required by Rule 75 (p) (2) (2) (d).

ARGUMENT

Point 1. The division of property belonging to the parties was proper inasmuch as the trial court must consider each case on its own facts, and to achieve equity, may exercise wide latitude as it deems just and proper.

In testimony presented at trial it was established that the marriage of the parties was perilously "on the rocks" almost from its very beginning. Some three weeks subsequent to the marriage ceremony the Defendant-Appellant abandoned his new wife while they were on vacation in Phoenix, Arizona (they were residing in Ruidoso, New Mexico at the time) leaving only a note stating that he was going to go away with Edith, another woman. (Tr. P14, LL24, 25, Tr. P15, LL1-20). This first extended absence lasted for a period of Twenty-one days (Tr. P15, LL20-23). In the five years that followed, the Defendant-Appellant made excursions to distant parts of the country from Florida (Tr. P15, LL12-15) to California (Tr. P33 LL11-12) on eleven different occassions, some lasting as long as three months (Tr. P29, LL14-23). In total, the Defendant-Appellant was absent from his wife over three hundred days. (Tr. P14, LL3-9).

As presented in the statement of facts, the Plaintiff-Respondent came into the marriage with at least $22,500.00 in

savings and certificates of deposit (Tr. P39, LL19-25), a home and an automobile fully paid for (Tr. P40, LL7-11).

The Defendant-Appellant, on the other hand, came into the marriage with nothing more than the right to receive a social security check in an amount of less than $240.00 (Tr. P198, LL6,7), an old suitcase with a rope tied around it, and a duffle bag containing a few old clothes. (Tr. P41, LL12-25, P42, LL1-24).

At the end of the marriage, Plaintiff-Respondent's savings and certificates of deposit had been completely depleted, a large portion thereof having been spent on keeping the household and providing the expenses of improvement of the same (Tr. P62, LL9-25), sending money to the Defendant-Appellant at his request in exchange for his continual promises to return from his visits to other women, and giving the Defendant-Appellant money at his request to sustain his expensive gambling habit in Las Vegas (Tr. P60, LL9-25, Tr. P51, LL1-25, Tr. P74, LL4-23). The only items of property remaining were the mobile home, the furniture therein and the automobile, all of which had also been purchased with Plaintiff-Respondent's separate funds (Tr. P38, LL4-9, LL20-25). In essence, the Plaintiff-Respondent entered this marriage well situated, with enough income to take care of herself likely for the remainder of her life. How-

ever in a few short years she went out of the marriage having lost a substantial portion of her assets, and the Defendant-Appellant having received substantial benefits therefrom. The Defendant-Appellant then comes before the court, contests the property distribution, and attempts to gain one-half of the rest of the Plaintiff-Respondent's assets as a result of his having helped around the yard on the three homes in which the couple lived.

The lower court, after hearing the evidence, found no basis for assisting the Defendant-Appellant in his further usurpation of the Plaintiff-Respondent's property, but rendered a just and equitable award consistent with the facts of the case.

The lower court's consideration of the Defendant-Appellant's repeated marital misconduct in making an equitable division of the property was consistent with the rule first enunciated in Wilson v. Wilson 5 Utah 2nd 79, 296 P. 2d 977 (1956):

> "In regard to the defendant's contention that the judgment represents an effort of the court to impose a punishment upon him: We recognize that there is no authority in our law for administering punitive measures in a divorce judgment, and that to do so would be improper, except that the court may, and as a practical matter invariably does, consider the relative loyalty or disloyalty of the parties to their marriage vows, and their relative guilt or innocence in causing the breakup of the marriage. It is to be recognized that it is seldom, perhaps never, that there is any wholly

> guilty or wholly innocent party to a divorce action. The trial court was aware, of course, that when people are well adjusted and happy in marriage, one of them does not just out of a clear blue sky fall in love with someone else; and that when this occurs it is usually an indication that the marriage has disintegrated from other causes." (Emphasis ours)

From the facts presented at trial, the Defendant-Appellant's disregard for the marriage vows was so flagrant that at one point he left the Plaintiff-Respondent for a period of three months, moved into an apartment with the girlfriend Edith only to return when he ran out of money (Tr. P29, LL3-25, P30, LL1-8). He stated at the trial that his reason for leaving the Plaintiff-Respondent only three weeks after their marriage was because of his admitted love for another woman (Tr. P158, LL1-8).

The trial court in its findings did not state that it was administering any punitive measures against the Defendant-Appellant, but only that marital misconduct was taken into consideration in making an equitable property settlement. That particular finding, taken together with other facts replete in the record such as; (a) that only the Plaintiff-Respondent brought substantial property into the marriage, property accumulated and paid for prior to the Defendant-Appellant's arrival upon the scene; (b) that little or no property was accumulated during the marriage with the exception of appreciation of the real property which had been bought and paid for by Plaintiff

Respondent; (c) that the ability of either party to earn money was limited, inasmuch as both parties were over the age of retirement; (d) that the financial condition of the Plaintiff-Respondent was secure whereas the Defendant-Appellant had only Social Security as a source; (e) that the duration of the marriage was less than six years, no children having been born, and the Defendant-Appellant having been absent a great deal of the time; (f) that the Plaintiff-Respondent, by way of this marriage had to give up her substantial security and share it with the Defendant-Appellant through the duration of the marriage; (g) that the Defendant-Appellant exerted pressures upon the Plaintiff-Respondent to provide for him and place some of her property in joint tenancy (Tr. P115, LL8-23) all lend support to the logic of the lower court's distribution of the property.

In light of all the facts the trial court clearly followed the guidance provided in the recent case of Read v. Read 594 P. 2d 871, Utah (1979) wherein it stated:

> "When a marriage has failed, a court's duty is to consider the various factors relating to the situation and to arrange the best possible allocation of the property and the economic resources of the parties so that parties and their children can pursue their lives in as happy and useful manner as possible." (emphasis ours)

The trial court distributed the property 77% to the Plaintiff-Respondent and 23% to the Defendant-Appellant. Each party

after the separation returned to live with a relative; the Plaintiff-Respondent in Texas, and the Defendant-Appellant in California. The Defendant-Appellant was at least, from a financial standpoint, returned to a position where, as he admitted at trial, was no worse off than he was prior to the marriage. (Tr. P200, LL9-25). The Plaintiff-Respondent however suffered irreparable financial loss as a result of the entanglement and was not, and apparently could not be, returned to her pre-marriage financial condition.

It would appear that the trial court was very cautious to properly apply the rule of Read v. Read Supra. However the court was apparently also aware that the same rule of law applied to a new set of facts may result in a different outcome. In Read the court dealt with the breakup of a twenty-five year marriage which included four children (one still living at home), five automobiles, a family business having been jointly managed by the parties for some eighteen years, and various other real and personal property possessions. The fruits of the marriage in Read were apparently born out of many years of joint toil and effort. In the present case there were no children, only a short marriage, and the court obviously decided that absent the facts of Read, the Defendant-Appellant had experienced a "pursuit of his life in as happy and as useful manner

as possible" at the expense of the Plaintiff-Respondent for five years of marriage and that by this action he should not be permitted to continue such a course.

The Defendant-Appellant presents the case of Martinett v. Martinett 8 Utah 2d 202, 331 P2d 821 (1958), in support of its position. Once again, as in Read, Supra the fundamental rule is correct, that the trial court must consider the various factors relating to the situation and not abuse its discretion, however the facts of the case are entirely different. In Martinett the parties had as the opinion states; "spent substantially their adult lives together." They had raised two children and had accumulated significant property over the course of thirty-three years of marriage. The court found itself in the position of having to untie the complicated knot of thirty-three years of property accumulation, contributions by the parties, and the degrees of reliance of one party upon another over the years. These facts are hardly similar to those of the case now before the court.

The Plaintiff-Appellant strongly emphasizes that given the facts of the current case, and given the law of the above stated cases, the trial court would have been clearly abusing its discretion if it had attempted to treat the brief, uncertain, and loose arrangement between the

parties in this case in the same fashion as the law requires a marriage to be treated when being dissolved after long years of interwoven interests and untraceable accumulations of property. The trial court applied the proper law to the proper facts and in so doing was well within the bounds of the underlying test in this matter before the court, first laid down in Wilson Supra. and reiterated in Martinett as follows:

> "Nevertheless, it is firmly established in our law that the trial judge will be indulged considerable latitude and discretion in adjusting the financial and property interests of the parties; conversely however, if there is such serious inequity as to manifest a clear abuse of discretion, this court will make the modification necessary to bring about a just result." (emphasis ours)

The Plaintiff-Respondent respectfully submits that a just result has been reached and that the trial court was proper exhibiting no serious inequity or abuse of discretion in making its award in this case.

Point 2. The court below properly awarded the Defendant-Appellant the value of his labors consistent with evidence presented at trial. The conduct and testimony of the parties demonstrated that no gift was intended and that each party considered himself owner of his separate property.

The trial court did find and award the Defendant-Appellant the reasonable value of his labors on the third home owned by the parties in the amount of $2,100.00 (FINDINGS P. 1, March 2, 1979). There was extensive testimony and cross-examination regarding improvements to the previous two homes. Although much thereof was conflicting, certain points were established that apparently caused the trial court to find the Defendant-Appellant's claims to be unpursuasive:

1. The first home was bought and paid for by the Plaintiff-Respondent prior to the marriage of the parties. She made certain improvements including the enclosure of a carport and the back porch, paying for both lumber, other materials and labor (Tr. P43, LL15-25, P44, LL1-25).

2. Improvements to the homes were testified to by both parties, however, Defendant-Appellant was unable to establish that he significantly contributed to the funding of the improvements inasmuch as his income was limited to social security (Tr. P202, LL21-23, P50, LL15-22).

3. Plaintiff-Respondent funded all improvements to the homes (Tr. P50, LL23, 24, P49, LL12-25, P50, LL1-14).

4. The Defendant-Appellant was in his mid to late seventies during the time and had not worked for at least

five years and as such did not offer any specialized skill to the improvement of the yards of the three houses beyond that which was contributed by the Plaintiff-Respondent (Tr. P201, LL4-25, LL1-6).

5. The Plaintiff-Respondent assisted in the construction of the improvements (Tr. P46, LL9-23) as well as maintained the household activity which the Defendant-Appellant admitted was of equal importance to his labor (Tr. P209, LL15-25).

6. The Defendant-Appellant was absent from the homes a large portion of the time (Tr. P14, LL7-11). These points together with the demeanor of the parties at trial in the course of establishing their burdens of proof were the apparent basis for the trial court to hold contrary to the various theories and formulas now being placed before the court by the Defendant-Appellant.

The Defendant-Appellant's computations are in error for two reasons: (1) they take into consideration facts concerning labor on the Ruidoso and Roswell homes that were apparently unpursuasive and unproven at trial, (2) they fail to take into consideration the fact proven at trial that the improvements were funded by the Plaintiff Respondent out of her own separate funds (see APPELLANT'S BRIEF P. 17).

The Defendant-Appellant cites the case Lundgreen

Lundgreen 112 Utah 31, 184 P.2d 670 (1947) in support of its argument of improper distribution. However, as in previous cases cited, Lundgreen although somewhat similar, is based on specific facts which are not present in the case before the court. In Lundgreen, the party claiming the value of its labors was also able to establish that it contributed some of the costs of the improvements and that it did considerable work to aid in improvement of the property to make the house liveable. In the current case, the Defendant-Appellant never established any such contribution, but raised doubt in such regard inasmuch as he traveled widely, was often absent, and also used his own funds for gambling purposes. To fund construction improvement on less than $240.00 per month in addition to financing his other activities would seem very unlikely. His testimony as to labor consisted only of general yard work and such.

Another critical element in Lundgreen is that the party claiming the value of her contributions established at trial that it had entered into an agreement with the other party whereby she would furnish the home if the other party would purchase it. In the present case there is no evidence of such an agreement, in fact the first home was bought and paid for some six months prior to the marriage.

It would seem that the more proper interpretation

of Lundgreen would point to the argument that where a party is unable to establish at trial that it made financial contributions for improvements, or rendered considerable labor and time in such improvements, and that the same was done pursuant to an agreement related to the original procurement of the property, then the party asserting the interest should not be entitled to the Lundgreen award of one-half the market value in excess of the purchase price. The question then becomes one of "how much less than the Lundgreen award?" The trial court in its discretion apparently chose to draw the line at the last home and awarded the Defendant-Appellant the value of his labors consistent with Lundgreen.

Finally, in response to the Defendant-Appellant's claim that a gift was intended, the record speaks quite clearly for itself. The parties were married in their later years of life. They both had children and families of their own from past marriages. At trial the Plaintiff-Respondent clearly stated that she at no time intended to make a one-half gift of her life's savings and investments, including the real estate to the Defendant-Appellant (Tr. P115, LL5-25). She did state that he placed considerable pressure upon her to put the property in joint tenancy (Tr. P115, LL8-24, P116, LL6-13). She stated that it had always been her intention

to give the property to her family in the event of her death (Tr. P116, LL10-13). The Defendant-Appellant clearly admitted that he had no interest in the separate property (See APPELLANT'S BRIEF P.17)

Although there may be some precedent outside this jurisdiction which claims that the placing of property in joint tenancy creates a gift of one-half between spouses, the testimony referred to above tends to clearly rebut such a presumption. Incidentally, there also exists precedent in foreign jurisdictions that hold that where title to property purchased as a home by a husband was taken in the name of himself and his wife as joint tenants, it was held that one of the implied conditions of the gift to her was violated when, about seven years later she abandoned her husband and went to live with another man. See Moore v. Moore 51 App. D.C. 304, 278 Fed 1017 (1922). Thus, marital misconduct may well affect a gift in joint tenancy, should it be so construed, by one spouse to another.

There are assuredly numerous theories by which division of property in divorce actions could be codified. The Plaintiff-Respondent notes that the Defendant-Appellant in his brief at trial also presented a "lien theory" and a "title theory" for the consideration of the court. The Plaintiff-Respondent however points out that this jurisdiction

has neither codified, nor set down any specific rules by whi property in divorce actions will be divided by the court. has not required that the mere designation of property held in "joint tenancy" suddenly creates some magical spousal uni of ownership that is beyond the power of the court to award, distribute or divide. What the court has said in this regar on many different occasions is perhaps most aptly re-stated in its opinion in Weaver v. Weaver 21 Utah 2d, 442 P.2d 928, (1968);

> The problem of a division of property between parties to divorce proceedings has been before this court on numerous occasions. Section 30-3-5, U.C.A. 1953, provides that when a decree of divorce is made the court may make such orders in relation to the property as may be equitable. The decisions of this court have not announced a fixed rule or formula for the division of property, but the rule announced in practically all of the cases is to the effect that the trial court has wide discretion in these matters and the judgment of the trial court will not be disturbed unless the record shows there has been an abuse of discretion on the part of the court. (emphasis ours

Accordingly, there is no requirement that the trial court should have adopted the Defendant-Appellant's theories and formulas, and from the trial court's judgment in the matter it is clear that all such formulas and theories were rejected Any findings as to intentions to make or not make gifts, the effect of joint holdings, values of labor, funding of improve ments and such were all merged in the discretionary decision

of the court. To adopt any set rules, particularly with respect to the Defendant-Appellant's gift theory would merely further hamstring the courts in the already difficult task of dividing property in divorce actions and the Plaintiff-Respondent urges that the adoption of any such rule be avoided.

CONCLUSION

Plaintiff-Respondent respectfully submits that the trial court's award of 77% to the Plaintiff-Respondent and 23% to the Defendant-Appellant of the marital estates was proper and clearly within the discretion of the court. The Defendant-Appellant has failed to consider the certain factors apparently taken into consideration by the trial court and has thus based its appeal on assumptions that apparently were not sufficiently proven at trial.

The court properly considered all the factors relating to the situation of the parties which included evidence of marital misconduct which as a practical matter may be used in determining the division of property.

The Plaintiff-Respondent, during her years of marriage to the Defendant-Appellant suffered the depletion of her entire savings and investments with the exception of one mobile home in St. George, Utah. It would only serve to double her loss were the Defendant-Appellant, after living far above his means at the expense of the Plaintiff-Respondent,

and after having contributed very little in return, but extensive heartache and grief, be able to use the courts to obtain a substantial portion of the Plaintiff-Respondent's remaining property.

Dated this 10th day of October, 1979.

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Attorney for Plaintiff-Respondent